Supreme Court, U.S.
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In The
Supreme Court of the United States

MARALYN S. JAMES,

Petitioner,

v.

METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY NASHVILLE PUBLIC LIBRARY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the decision of the Sixth Circuit which is inconsistent with this Court's subsequent decision in *Burlington N. & S.F.R. Co. v. White,* 548 U.S. ___, No. 05-259, slip op. 1-18 (June 22, 2006) should be remanded to the Sixth Circuit for reconsideration.

2. Whether an employer may be held liable for retaliatory discrimination under Title VII by depriving the employee of her career and the opportunity to draw her full service pension after she made complaints of age and disability discrimination.

LIST OF PARTIES

Parties to the proceeding include the two parties listed in the caption.

CORPORATE DISCLOSURE STATEMENT

Petitioner is a private individual.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Maralyn S. James respectfully prays for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

ORDERS ENTERED IN THE CASE

The District Court entered Petitioner's jury verdict on May 17, 2004 and it is reproduced at Petitioner's Appendix 13.

The District Court entered its order denying the Government's Rule 50 motion on June 17, 2004, reproduced at Petitioner's Appendix 12.

The Court of Appeals for the Sixth Circuit entered its initial decision reversing James' jury verdict on December 14, 2005, Court of Appeals Opinion, *James v. Metropolitan Government of Nashville and Davidson County Nashville Public Library,* No. 04-5874 (6th Cir. December 14, 2005) reproduced at Petitioner's Appendix 1-11.

On April 14, 2006, the Court of Appeals denied both the petition for rehearing and the petition for rehearing en banc and entered an unpublished order reproduced at Petitioner's Appendix ("App."), 15-16.

BASIS FOR SUPREME COURT JURISDICTION

Petitioner seeks review of the Sixth Circuit's original order entered December 14, 2005 and the Sixth Circuit's denial of the petition for rehearing entered on April 14,

2006. The present petition is timely filed under 28 U.S.C. § 2101(c) and under Rule 13.3 of this Court.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) to review on a writ of certiorari the judgment of a federal court of appeals.

STATUTORY PROVISION INVOLVED

42 U.S.C. § 2000e-3(a) Other unlawful employment practices, provides:

Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

STATEMENT OF THE CASE

This case is a section 704(a) retaliation case decided by the Sixth Circuit prior to this Court's decision in *Burlington*

N. & S.F.R. Co. v. White, 548 U.S. ___, No. 05-259, slip op. 1-18 (June 22, 2006). The jury found retaliation in violation of Title VII and awarded the petitioner $43,000 in damages. App. 13. The employer appealed on the sole issue of whether the petitioner had suffered an adverse employment action. App. 5, 12.

On December 14, 2005, the Sixth Circuit reversed, holding that the retaliation inflicted on the petitioner did not meet the Sixth Circuit's narrow interpretation of section 704(a). App. 7, citing *Policastro v. Northwest Airlines, Inc.*, 297 F.3d 535, 539 (6th Cir. 2002) (citation omitted). Maralyn S. James ("James") filed a petition for rehearing en banc or, in the alternative, for rehearing by the original panel. On April 14, 2006, at approximately the same time that *Burlington Northern & Santa Fe Railway Co. v. White* was argued before this Court, the Sixth Circuit denied James' petition for rehearing.

Petitioner asks this Court to grant certiorari, vacate the Sixth Circuit's opinion and remand for reconsideration in light of *Burlington Northern & Santa Fe Railway Co. v. White*, slip op. 1-18.[1]

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[1] On June 30, 2006, in light of the *Burlington Northern* decision, this Court remanded the following cases:

Jordan v. Chertoff, No. 05-1233 (U.S. 2006).

Cavicchi v. Chertoff, No. 05-770 (U.S. 2006).

Thomas v. Potter, No. 05-1267 (U.S. 2006).

McAdams v. Harvey, No. 05-683 (U.S. 2006).

Scurlock-Ferguson, Vester K. v. Durham, NC, No. 05-10032, 2006 WL 816741 (U.S. June 30, 2006).

Garner, Donald v. Ashley Furniture Industries, No. 05-507, 2006 WL 1788317 (U.S. June 30, 2006).

The basis for federal jurisdiction in the court of first instance was 28 U.S.C. § 1331, federal question jurisdiction with a violation of the discrimination laws including 42 U.S.C. § 2000e-2(a) and 3(a).

James was an "outstanding" thirty-year Civil Service employee at the employer's Public Library who developed a medical condition diagnosed as a "mild cognitive dysfunction relating to stress at work" and could not meet the quotas set for the book cataloging aspect of her job as Librarian II. App. 1-2. Even though James' problems with speed in cataloging had been documented as early as 1996, the employer did not take any steps to suspend, demote or terminate James or to discipline her in any way until after James complained of discrimination. App. 2, 3. Immediately after James made a charge of age and disability discrimination, the employer took numerous retaliatory actions aimed toward demoting or terminating her. App. 1-11.

First, the employer completely ignored James' medical restrictions. App. 3-4. James' physician had notified the employer that she was "to limit stress at work, specifically no overtime and working at a pace consistent with her abilities due to her medical condition." App. 2. In spite of the restrictions, the employer insisted that James increase her cataloging speed or be terminated. App. 3.

James then applied for lateral transfers to two other available Librarian II positions which had no cataloging quotas and which, according to the Library Director, she was capable of performing. App. 3; II Tr. 180. The employer retaliated again by making a decision, recorded in writing, to resist James' lateral transfer and demote her to the status of a newly hired librarian. App. 4; II Tr. 185-186,

Trial Exhibit 23. In effecting that decision, the employer even refused to allow James an interview for the Librarian II jobs even though she was ranked Number 1 in the list of applicants for one of the two positions. App. 2-3.

As her cataloging speed increased but her medical condition worsened because of the employer's constant reprimands, James' physician ordered James to stop cataloging and placed her on medical leave. App. 3-4. The employer advised James that if she did not accept a demotion to a Librarian I position she would be charged as absent without leave and subject to disciplinary action. App. 4. If James accepted the demotion to a Librarian I job, she would be on probation and would lose her seniority. I Tr. 113; II Tr. 155, 194-195.

In an effort to avoid demotion or termination, James applied for disability benefits. App. 4. The employer's normal practice was to encourage such applications when an employee developed medical restrictions and could not perform her job. III Tr. 350-353, 360. The Chairman of the Benefit Board gave uncontradicted evidence that, if the employer had supported James in her disability application, she would have been approved for the disability benefits. III Tr. 354.

As another retaliatory act leading to James' loss of her career, the employer disregarded its routine practice and fought James' application for disability benefits with a vengeance and with success. App. 4. James thereby lost her opportunity to ever draw a full service pension. III Tr. 355, 357, 382, 442-443. At the time of trial, she no longer had her career and she was drawing a smaller early service pension. App. 8.

A few months prior to the James' decision, the Sixth Circuit, sitting en banc in *White v. Burlington Northern & Santa Fe Rail Co.,* 364 F.3d 789, 799 (6th Cir. 2004), had rejected the EEOC's reality based definition of adverse employment actions in Title VII retaliation cases. That definition set forth in the EEOC Guidelines is "any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter a charging party or others from engaging in protected activity." *Burlington N. & S.F.R. Co. v. White,* slip op. 11. In rejecting the EEOC definition, the Sixth Circuit clung to the definition it had adopted in *Hollins v. Atlantic Co.*, a "materially adverse change in the terms and conditions of [plaintiff's] employment." *Id.* at 795, 800; quoting 188 F.3d 652, 662 (6th Cir. 1999).

The Sixth Circuit also held that its restrictive definition of adverse employment actions applied "equally to all Title VII discrimination claims, not only to retaliation claims." *Id.* at 799 citing *Morris v. Oldham County Fiscal Court,* 201 F.3d 784, 791-92 (6th Cir. 2000) (applying rules of statutory construction to hold that "discriminate against" means the same thing each time it appears in Title VII); *Mattei v. Mattei,* 126 F.3d 794, 806 (6th Cir. 1997) (presuming that Congress intended the phrase "discriminate against" to have the same basic meaning each time it is used in a statute).

This Court has now rejected the Sixth Circuit definition of Title VII adverse employment actions as a "stringent interpretation of the anti-retaliation provision (the interpretation that limits Section 704 to the same employment-related conduct forbidden by Section 703)." *Burlington N. & S.F.R. Co. v. White,* slip op. at 12, 15.

This Court explained that "such a limited construction would fail to fully achieve the anti-retaliation provision's 'primary purpose,' namely, '[m]aintaining unfettered access to statutory remedial mechanisms.'" *Id.* slip op. at 9 quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997).

This Court further held in rejecting the Sixth Circuit standard that "the anti-retaliation provision, unlike the substantive provision, is not limited to discriminatory actions that affect the terms and conditions of employment." *Burlington N. & S.F.R. Co. v. White,* slip op. at 9, 15-16.

In addressing the scope of the Title VII anti-retaliation provision, this Court explained that "the significance of any given act of retaliation will often depend upon the particular circumstances." *Id.*, slip op. at 14. Each retaliation case must be considered on its own individual facts, recognizing the importance of the "constellation of surrounding circumstances, expectations and relationships" as sanctioned in an earlier decision. *Id.* citing *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 81-82 (1998).

This Court suggested that an "act that would be immaterial in some situations is material in others." *Id.* citing *Washington v. Illinois Dept. of Revenue*, 420 F.3d 658, 661 (7th Cir. 2005). For instance, "[a] schedule change in an employee's work schedule may make little difference to many workers, but may matter enormously to a young mother with school age children." *Id.* citing *Washington* at

662 (finding flex-time schedule critical to employee with disabled child).

In James' case, the Sixth Circuit summarily dismissed the many acts of James' employer as not being adverse actions, without focusing on the significance of each act within the context of James' situation to see if the act was material and caused James harm inside or outside the workplace. See *Burlington N. & S.F.R. Co. v. White,* slip op. at 14-15; App. 7-9. And, the Sixth Circuit did not consider whether the acts of James' employer would have dissuaded a reasonable employee from complaining of discrimination.

Under this Court's standard, many of the acts of James' employer produced harm to James. *Id.*, slip op. at 13. For instance, the intentional failure to interview James and transfer her to a job that she could perform with her medical restrictions was just one of those material adverse actions sufficient to sustain her verdict.

ARGUMENT

REASONS FOR GRANTING THE PETITION

THE DECISION OF THE SIXTH CIRCUIT COURT WAS ISSUED PRIOR TO, AND APPLIED A STANDARD INCONSISTENT WITH, THIS COURT'S DECISION IN *BURLINGTON NORTHERN & SANTA FE RAILWAY CO. V. WHITE.*

This petition should be granted and the case remanded because the Sixth Circuit's decision conflicts with this Court's decision in *Burlington N. & S.F.R. Co. v.*

White, 548 U.S. ___, slip op. at 9 (June 22, 2006); Rules of the Supreme Court of the United States, Rule 10(c).

Prior to deciding James' case, the Sixth Circuit had rejected the EEOC standard for an adverse employment action in Title VII retaliation cases, explicitly stating that "[w]e therefore reject White's and the EEOC's request that we adopt a new definition of adverse employment action for purposes of Title VII retaliation cases, and we reaffirm the definition that we have developed in cases such as *Kocsis* and its progeny." *White v. Burlington Northern & Santa Fe Rail Co.*, 364 F.3d at 800; *Kocsis v. Multi-Care Management Inc.*, 97 F.3d 876, 885-887 (1996). Further, the appellate court promised that "we will continue to define the exception narrowly so as not to frustrate the purpose of Title VII while deterring lawsuits over trivial matters." *Id.*

That Sixth Circuit standard, which required the employee to show a "materially adverse change in the terms or conditions of employment because of [the] employer's conduct," and which was applied in James' case, has been rejected by this Court as a "limited" and "stringent interpretation of the anti-retaliation provision." *Burlington N. & S.F.R. Co. v. White*, slip op. at 15; see App. 7 citing *Policastro v. Northwest Airlines, Inc.*, 297 F.3d 535, 539 (6th Cir. 2002) (citation omitted).

This Court has adopted a standard almost identical to the EEOC standard rejected by the Sixth Circuit. If the standard now approved by this Court had been applied to the James case, the jury verdict would have been upheld. Many of the employer's acts, after James made complaints

of discrimination, were harmful enough to fall within the reach of section 704(a), Title VII's anti-retaliation provision.

CONCLUSION

This Court should grant certiorari, vacate the decision of the Sixth Circuit, and remand this case for reconsideration in light of the Court's decision in *Burlington Northern & Santa Fe Railway Co. v. White.*

Respectfully submitted,

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No. 04-5874

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Maralyn S. James, Plaintiff-Appellee, v. Metropolitan Government of Nashville and Davidson County Nashville Public Library, Defendant-Appellant.	)	**ON APPEAL** FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE **OPINION**

Before: GILMAN and COOK, Circuit Judges, and MILLS, District Judge.*

RICHARD MILLS, District Judge.

I. HISTORY

The Metropolitan Government of Nashville and Davidson County operates the Nashville Public Library (collectively "the Government"). Maralyn James began working for the Library in 1971 as a "Librarian I," acquiring records, raising funds, cataloguing materials, and performing other tasks. From 1971 to 1994, James received performance ratings primarily of "outstanding" and "above average."

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* The Honorable Richard Mills, United States District Judge for the Central District of Illinois, sitting by designation.

In 1994, the Library transferred James to its main branch and promoted her to "Librarian I-and-a-half." In 1996, James received a negative performance evaluation with respect to the speed of her work. She knew that she was not cataloguing materials as quickly as her coworkers.

In July 1999, James became a "Librarian II" via a reclassification of library job titles. Her responsibilities remained unchanged and the speed of her work remained unsatisfactory. Performance evaluations from 1996 through 2001 consistently criticized James' output. For instance, James' 1999 performance evaluation noted that she was cataloguing "just over 2 titles per hour (as opposed to the 7-8 expected) . . . Continued low output in her primary job responsibility is not acceptable and will have serious consequences if the situation is not corrected."

On October 1, 2001, James' supervisor, Linda Neff, gave James a deadline to catalogue a collection of books. James considered the deadline unfair and the resulting stress led her to seek medical attention for headaches and high blood pressure. James' doctor, Michael Callaway, M.D., advised her to take several days off work. He also sent the Library a letter notifying it that James was "to limit stress at work, specifically no overtime and working at a pace consistent with her abilities due to her medical condition." Dr. Callaway later diagnosed James as having "mild cognitive dysfunction relating to stress at work."

On October 3, James wrote a letter complaining that she was being subjected to "harassment" and a "hostile work environment." James requested a transfer because the hostility was detrimental to her health. One of the letter's recipients, Library Director Donna Nicely, called James into her office on October 9 to discuss James' complaint.

Supervisors Suliang Feng and Chase Adams were present at the meeting. Adams told James "if you will just volunteer to take a demotion, this will all be over with." James did not volunteer to take a demotion and the Library did not approve her transfer. The Library investigated her complaint and on October 31, 2001, concluded it had no merit.

By the end of 2001, James' poor productivity caused her to fail an annual evaluation. The Library advised James that she would be fired if her productivity did not improve. On January 29, 2002, James filed an EEOC charge against the Government alleging age discrimination, disability discrimination, and retaliation. She received a "right to sue letter" on January 31, 2002. That same day, James submitted a letter seeking a lateral transfer to "Librarian II-audio visual." Despite being ranked first on the list of applicants, James did not receive an interview.

The Library scheduled a performance re-evaluation for James on March 1, 2002, but the re-evaluation was postponed for a month at James' request. By April 1, James was unable to catalogue an average of 6 items per hour, a goal the Library had given her. The Library did not discipline James. Instead, it gave her time to improve her productivity and offered to assist her in that regard. To that end, the Library accommodated James' request to adjust lights around her computer and provide her with special computer glasses. The Library also offered techniques for James to improve her output.

James filed a second retaliation claim with the EEOC and received a "right to sue" letter on April 16, 2002. She

sued the Library and the Metropolitan Government of Nashville and Davidson County on April 30, 2002.

The Library gave James until May 16, 2002, to increase her catalogue average to 6 items per hour. By May 9, James was averaging 5.75 items per hour. However, on May 13, 2002, James' neurologist, Dr. Alan Bachrach, informed the Library that James could not return to her job because she could not keep up with the quotas. That same day, James wrote the Government's benefits department to say that if the Library did not accommodate her with a position at her current level of Librarian II, she would apply for a disability pension.

In June 2002, the Library offered to transfer James to a Librarian I position. James refused the demotion and applied for a disability pension. On November 19, 2002, the Library informed James that if she did not accept a demotion she would be charged as absent without leave and subject to disciplinary action.

The Library informed the Benefits Board that it "offered to accommodate [James] at a lesser position with current salary." However, the Library did not disclose that the salary for the lesser position would, after three months, be reduced to a level that was less than James' Librarian II salary. Because the Library said it could accommodate James, the Benefits Board rejected her claim for a disability pension on April 2, 2003. James sought reconsideration, which was also denied.

James received her last paycheck in March 2003. When she noticed that her family health insurance premium had not been deducted, she immediately notified the Government. James took a $209.20 personal check to the Government's payroll department to pay her premium.

She continued to make payments each month her disability pension appeal was pending. In late July 2003, James received a letter from CIGNA cancelling her family health insurance due to non-payment of premiums. However, the letter was a mistake and the insurance was never cancelled. She took an early service pension and terminated her employment on or about March 1, 2003.

James sued the Government on April 30, 2003, alleging claims under the Americans with Disabilities Act (the "ADA"), 42 U.S.C. § 12111, *et seq.*, the Age Discrimination in Employment Act (the "ADEA"), 29 U.S.C. § 621, *et seq.*, and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* The district court dismissed the ADA and ADEA claims on summary judgment and James proceeded to trial on her Title VII hostile work environment and retaliation claims. On May 14, 2003, the jury found the Government liable for retaliation and awarded James $42,000 in compensatory damages. The Government moved to have the verdict set aside under Federal Rule of Civil Procedure 50(a), claiming that the evidence did not show that James had suffered an adverse employment action. The district court denied the Government's motion.

II. STANDARD OF REVIEW

This Court reviews a district court's denial of a motion for judgment as a matter of law *de novo*. *Estate of Riddle ex rel. Riddle v. Southern Farm Bureau Life Ins. Co.*, 421 F.3d 400, 408 (6th Cir. 2005). The Court views the evidence in the light most favorable to the nonmoving party. *Gray v. Toshiba Am. Consumer Prods., Inc.*, 263 F.3d 595, 598 (6th Cir. 2001). It will affirm the jury's verdict unless there was "no legally sufficient evidentiary basis for a

reasonable jury to find for [the prevailing] party." *See* Fed.R.Civ.P. 50(a).

III. ANALYSIS

"In an action under Title VII, the plaintiff may prove unlawful retaliation by presenting direct evidence of such retaliation or by establishing a *prima facie* case under the *McDonnell Douglas* framework." *Abbott v. Crown Motor Co.*, 348 F.3d 537, 542 (6th Cir. 2003) (referring to *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973)). To do this, a plaintiff must prove that: (1) plaintiff engaged in activity protected by Title VII; (2) this exercise of protected rights was known to defendant; (3) defendant thereafter took an adverse employment action against the plaintiff, *or the plaintiff was subjected to severe or pervasive retaliatory harassment by a supervisor*; and (4) there was a causal connection between the protected activity and the adverse employment action or harassment. *See Morris v. Oldham County Fiscal Court*, 201 F.3d 784, 792 (6th Cir. 2000) (emphasis in original) (citations omitted). "If and when a plaintiff has established a prima facie case, the burden of production of evidence shifts to the employer to 'articulate some legitimate, nondiscriminatory reason' for its actions." *Id.* (quoting *McDonnell Douglas*, 411 U.S. at 802). The plaintiff must then demonstrate "that the proffered reason was not the true reason for the employment decision." *Id.* (quoting *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 256, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981)). The employer may also prove an affirmative defense to retaliatory harassment by a supervisor by demonstrating: "(a) that the employer exercised reasonable care to prevent and correct promptly any . . . harassing behavior, and

(b) that the plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer to avoid harm otherwise." *Burlington Industries, Inc. v. Ellerth,* 524 U.S. 742, 118 S.Ct. 2257, 2270, 141 L.Ed.2d 633 (1998).

A. Adverse Employment Actions

"An adverse employment action is a 'materially adverse change in the terms or conditions of . . . employment because of [the] employer's conduct.'" *Policastro v. Northwest Airlines, Inc.,* 297 F.3d 535, 539 (6th Cir. 2002) (citation omitted). "A materially adverse change might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation." *Ford v. Gen. Motors Corp.,* 305 F.3d 545, 553 (6th Cir. 2002) (citation omitted); *see also Kocsis v. Multi-Care Mgmt., Inc.,* 97 F.3d 876, 886 (6th Cir. 1996). A change in employment conditions "must be more disruptive than a mere inconvenience or an alteration of job responsibilities." *Kocsis,* 97 F.3d at 886 (citation omitted). *De minimis* employment actions, such as "[r]eassignments without changes in salary, benefits, title, or work hours usually do not constitute adverse employment actions." *Policastro,* 297 F.3d at 539.

At trial, James produced evidence of various harms the Government allegedly caused her (*i.e.*, denial of lateral transfers, bad employment evaluations, imposition of cataloguing quotas, etc.). Those harms are not adverse employment actions. *See Sherman v. Chrysler Corp.,* 47 Fed.Appx. 716, 721-22 (6th Cir. 2002) (unpublished)

(denial of lateral transfer is not an adverse employment action under the ADEA); *Primes v. Reno,* 190 F.3d 765, 767 (6th Cir. 1999) (an unfavorable evaluation without an accompanying adverse employment action, such as a lower wage, is not actionable as a Title VII retaliation claim); *Agnew v. BASF Corp.*, 286 F.3d 307, 10 (6th Cir. 2002) (requiring an employee to comply with a reasonable performance plan or be subject to discipline does not constitute an adverse employment action under the ADEA).

James also contended that the Government's opposition to her disability application, the "cancellation" of her family's health insurance, its "misrepresentation" about paying her the same salary to work a lesser position, and the reduced service pension it paid her are adverse employment actions.[1] James is incorrect in all respects.

In the present case, the Library's failure to support James's disability application was not an adverse employment action because it did not cause a material change in her benefits. And while James claimed that the Government misrepresented that it offered her a lesser position with current salary as an alternative to her seeking disability, the record shows that James informed the Benefits Board that her salary would be slightly lower if she accepted the lesser position. The Board's decision to deny James a disability pension despite the discrepancy

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[1] Although these events occurred after James left the workplace, post-employment injuries can be actionable under Title VII. *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 339, 346, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997) (holding that the term "employees," as used in Title VII's anti-retaliation provision, includes former employees bringing suit for retaliatory, post-employment actions, such as a negative reference to a potential employer).

shows that the Government's "misrepresentation" did not affect the Board's decision. Thus, James suffered no adverse employment action via the alleged misrepresentation or cancellation.

James also failed to show that her family's insurance was cancelled. The testimony showed that an insurance company (not the Government) sent James a letter cancelling her family's health insurance. However, the letter was a mistake and the insurance was never cancelled.

The closest James came to establishing an adverse employment action was when she alleged that the Government reduced her service pension. Prior to James' retirement, John Kennedy, the Government's Assistant Director of Human Resources, provided James a chart showing that her pension would be $1,803.66 per month if she ended her service on March 1, 2003, at age 55 and a half. James ended her service at that time, but her monthly pension turned out to be $1,506.06. Although James contended that the smaller pension was evidence of retaliation, the chart plainly explained that any person who retired before reaching age 60 would have his or her pension reduced by 4% per year. Thus, James' pension was reduced to $1,506.06 per month because she retired early. It was not reduced due to retaliation. Even if the chart was somehow unclear or wrongly explained, James never contended that the Government used the chart to fraudulently induce her retirement and she never argued that she detrimentally relied on the chart.

B. Severe or Pervasive Retaliatory Harassment by a Supervisor

Alternatively, James argues that the jury could have returned a verdict in her favor based on severe or pervasive retaliatory conduct. Evidence of severe or pervasive supervisor harassment following a discrimination complaint can constitute retaliation for purposes of Title VII. *See Morris,* 201 F.3d at 792. The standard for severe or pervasive harassment is the same in the retaliation context as in the sexual and racial discrimination contexts. *Akers v. Alvey,* 338 F.3d 491, 498 (6th Cir. 2003) (citation and quotation marks omitted). Under this standard, the harassment must be "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Id.* (citing *Harris v. Forklift Sys., Inc.,* 510 U.S. 17, 21, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993)). "[T]his test has both an objective and a subjective component: the conduct must be severe or pervasive enough to create an environment that a reasonable person would find hostile or abusive, and the victim must subjectively regard that environment as hostile or abusive." *Id.* (citation omitted).

The *Morris* decision provides context for the "severe or pervasive harassment" standard. There, plaintiff Judy Morris filed a sexual harassment complaint against her supervisor, Brent Likins, for sexual harassment. *See Morris,* 201 F.3d at 787. In retaliation, Likins began calling Morris and visiting her workplace to harass her. He drove to her office building on several occasions and sat in his truck looking in her work window, "making faces at her." *Id.* at 793. Once, he even followed her home from work, drove up to her mailbox, and gave her "the finger." *Id.* He destroyed the television Morris watched at work,

and threw roofing nails on her home driveway several times. In light of those facts, this Court held that "a reasonable juror could conclude that Likins's behavior after the lodging of Morris's complaint constituted severe or pervasive retaliatory harassment." *Id.*

The only evidence James offers to show "severe or pervasive harassment" is the Government's opposition to her disability benefits application and "cancellation" of her health insurance. Because the Government was not responsible for the mistaken cancellation letter James received, the only action James can complain about is the Government's opposition to her benefits application. That opposition is not even close to the conduct present in *Morris*. Thus, as an objective matter, the Government's opposition to James' benefits application was not "sufficiently severe or pervasive to alter the conditions of [her] employment and create an abusive working environment."

IV. CONCLUSION

James did not present evidence sufficient for a jury to find in favor of her retaliation claim. We therefore REVERSE the district court's decision to deny the Government's Rule 50 motion and remand for proceedings consistent with this opinion.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
AT NASHVILLE

MARALYN S. JAMES	)	
	)	
v.	)	NO. 3:02-0428
METROPOLITAN GOVERN-	)	JUDGE CAMPBELL
MENT OF NASHVILLE/	)	
DAVIDSON CO.	)	

ORDER

(Filed June 17, 2004)

Pending before the Court is Defendant's Motion to Alter or Amend, or in the Alternative, Motion for New Trial (Docket No. 165). Defendant's Motion is DENIED.

In considering a motion under Fed. R. Civ. P. 59, the Court should not disturb a jury's verdict as long as it is based upon sufficient evidence and was reasonably reached. *Chandler v. Specialty Tires of America, Inc.*, 283 F.3d 818, 824 (6th Cir. 2002). The Court finds that there was sufficient evidence at trial to support the jury's verdict.

IT IS SO ORDERED.

/s/ Todd Campbell
TODD J. CAMPBELL
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION

JUDGMENT IN A CIVIL CASE

(Filed May 17, 2004)

MARALYN S. JAMES	)	
	)	
VS.	)	CASE #: 3:02-0428
METROPOLITAN GOVERNMENT OF NASHVILLE/ DAVIDSON COUNTY	)	Judge Campbell

• **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

◦ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the jury returned a verdict in favor of the plaintiff, Maralyn James. The jury determined that the defendant retaliated against the plaintiff in violation of Title VII and awarded the plaintiff compensatory damages in the amount of $42,000.00.

Thereupon the jury was polled and each juror affirmed the verdict as being his or her individual verdict.

May 17, 2004
DATE

KEITH THROCKMORTON,CLERK

BY DORIS E. BUSH
DEPUTY CLERK

No. 04-5874

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MARALYN S. JAMES, Plaintiff-Appellee, v. METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY NASHVILLE PUBLIC LIBRARY, Defendant-Appellant.	)	ORDER (Filed Apr. 14, 20046

BEFORE: GILMAN and COOK, Circuit Judges; and MILLS,* District Judge,

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

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*Hon. Richard Mills, Senior United States District Judge for the Central District of Illinois, sitting by designation.

ENTERED BY ORDER OF THE COURT
/s/ Leonard Green
Leonard Green, Clerk
[/s/ Illegible]

42 U.S.C. § 2000e-3. **Other unlawful employment practices**

(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.